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LEMBAGA KEMAJUAN JOHOR TENGGARA (KEJORA) v. FAJAR KENARI SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABANG ISKANDAR JCA
B NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: J-01(NCVC)(W)-414-10-2014]
31 JULY 2017

C ***LAND LAW:*** *Alienation and incidents – Obtaining approval for alienation of land – Processing of – State Authority rejected application for re-alienation of land – Whether due to actions of Land Administrator – Whether Land Administrator breached duty and obligation to ensure alienation of land be granted to plaintiff company – Whether there existed contract between plaintiff company and Land Administrator – Whether Land Administrator duty-bound to obtain approval for* D *alienation of land – Whether Land Administrator appointed as plaintiff's legal agent to apply for alienation of land – Whether Land Administrator in position to impose on State Authority that land be alienated exclusively to plaintiff company – Whether power to alienate land lay exclusively with State Authority – National Land Code, s. 78(3)*

E The first defendant ('KEJORA') was a statutory body established under Lembaga Kemajuan Johor Tenggara Act 1972 as a regional development agency for the southeast region of Johor. Kejora Properties Sdn Bhd ('KPSB'), a subsidiary of Kejora Holdings Sdn Bhd (a subsidiary of the first defendant) entered into a joint venture agreement with Remedy Properties F Sdn Bhd and Ungku Jamilah Holdings Sdn Bhd whereby it was agreed that upon alienation of a land ('the project land') to KPSB by the State Authority, the development rights over the project land would be granted to Fajar Kenari Sdn Bhd ('the plaintiff') a company incorporated pursuant to the joint venture agreement ('JV agreement'). On 25 March 1994, KPSB wrote a letter G to the first defendant (in its capacity as Land Administrator of the area) informing the latter that KEJORA's board of directors had agreed that KPSB would develop the project land and requesting the first defendant as the Land Administrator for the said area to process the application for alienation of the project land. On 1 October 1994, following the decision of the Federal Government to privatise the first defendant, a sale and purchase agreement H was entered into between the first defendant and Southern Integrated Agriculture Project Sdn Bhd ('SIAP') to award the privatisation of the first defendant's commercial activities to SIAP including its interest and liabilities in KPSB and the plaintiff. On 31 May 1995, the first defendant submitted a working paper to the second defendant in relation to the approval I application for the alienation of the project land to the plaintiff for the approval of the State Authority ('MMK'). The said application was approved

by the State Authority on 9 June 1999. On 3 August 1999, the second defendant informed the first defendant that the MMK had approved the alienation of the project land to the plaintiff and to submit four copies of completed layout plans before final approval could be given. Subsequently, the first defendant *vide* its letter dated 23 February 2006 informed the second defendant that its board of directors had agreed to cancel and revoke the application for the alienation of the project land to the plaintiff because it had divested its shares in the JV company *ie*, the plaintiff. On 16 May 2006, the first defendant forwarded a working paper through the second defendant for the MMK's approval, that the project land be alienated to the first defendant to be jointly developed with Iktikad Unggul Sdn Bhd. The said application was rejected by the MMK. Thus, on 12 February 2010, the first defendant wrote a letter to the second defendant requesting that the award of the project land be returned to the plaintiff. Subsequently, a meeting was held between the first defendant, the plaintiff and the second defendant to discuss the status of alienation of the project land to the plaintiff, and it was agreed that the first defendant would make a re-submission of the working paper to the second defendant for the MMK's approval. The MMK, however, rejected the appeal application. Thus, the plaintiff filed a suit against the first and second defendants. The main thrust of the plaintiff's case was that the MMK's rejection of their application for the realienation of the project land was caused by the first defendant's actions and that the first defendant had breached its duty and obligation to the plaintiff to ensure that the alienation of the project land should only be granted to the plaintiff. The High Court Judge gave judgment in favour of the plaintiff and ordered, *inter alia*, a declaration that the first defendant specifically perform its obligations to do all that would be necessary and to submit all relevant appeals to obtain approval for alienation of the project land to the plaintiff. Hence, the first defendant appealed against the said decision. The issues that arose, *inter alia*, were (i) whether there existed a contract between the plaintiff and the first defendant in respect of which the first defendant was obliged to ensure that the project land was approved and alienated to the plaintiff by the MMK; (ii) whether the first defendant had breached the alleged contract when such finding was not supported by any evidence whether oral or documentary; (iii) whether the first defendant was the plaintiff's legal agent appointed to apply for the alienation project land for and on behalf of the plaintiff; and (iv) whether the first defendant's actions or conduct had caused the MMK to reject the plaintiff's application for the re-alienation of the project land.

Held (allowing appeal):
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) Being the Land Administrator for the said area, the first defendant was the only body authorised to apply for the alienation of land in the southeast region of Johor with such applications required to be made through the office of the second defendant. The trial judge had found that the letter dated 21 April 2010 from the second defendant and the letter

dated 14 June 2010 from the first defendant amounted to confirmation and undertaking and tacit agreement between the plaintiff and the first defendant that the first defendant would be duty-bound to obtain state MMK approval for alienation of the project land to the plaintiff. The trial judge had committed an error of law and/or in fact in making the above finding as His Lordship had misconstrued the contents of the documents. It was clear from the contents of the aforesaid letter that the first defendant was merely conveying to the plaintiff the decision of the MMK on 9 June 1999 approving the alienation of the project land to the plaintiff upon the terms and conditions spelt out in the second defendant's letter of 21 April 2010. The first defendant was merely discharging its duty as the Land Administrator for the area in which the project land was situated when it issued the letter of 14 June 2010. These two letters were issued in the exercise of the first and second defendants' duties as Land Administrator and Pengarah Tanah Galian respectively. They could not, in the absence of any corroborative evidence setting out the terms and conditions of the alleged agreement, be construed as evidence of an agreement between the first defendant and the plaintiff. (paras 28, 32-35 & 37)

(2) DW1's evidence did not lend support to the High Court's finding of a principal-agent relationship between the plaintiff and the defendant. Rather, evidence showed that the first defendant was merely carrying out its duty as a Land Administrator when it submitted the application for alienation of project land to the plaintiff, to the MMK. The trial judge had erred in law and/or in fact when His Lordship held that based on the evidence of the first defendant, DW1 was the legal agent appointed to apply for alienation of the project land for and on behalf of the plaintiff. (paras 39 & 42)

(3) The trial judge's finding that the MMK's decision to reject the plaintiff's application for re-alienation of the project land was due to the actions of the first defendant, was clearly unsustainable. No evidence was adduced before the trial judge to show the basis for the MMK's decision. In the absence of such evidence, the finding of the trial judge implicating the first defendant for the MMK's decision was 'nothing more than an assumption of fact unsubstantiated by evidence.' (paras 45 & 46)

(4) The power to alienate the project land to the plaintiff lay exclusively with the State Authority. Section 78(3) of the National Land Code clearly stipulates that until the name of the proprietor is registered on the register document of title, the State Authority (the MMK) has all the power to deal with State land including alienating the land to other parties and revoking any approval for alienation previously made, and where necessary refunding the payments already made upon issuance of

notice in Form 5A. Further, no evidence herein was adduced to show that the first defendant in its role as Land Administrator for the southeast region of Johor and in its capacity as the regional land authority for Johor Tenggara was in a position to impose on the State Authority or MMK that the project land be alienated exclusively to the plaintiff. It was legally and factually impossible for the first defendant to fulfil such obligation. (paras 49 & 50)

Bahasa Malaysia *Headnotes*

Defendan pertama ('KEJORA') adalah sebuah badan berkanun yang ditubuhkan bawah Akta Lembaga Kemajuan Johor Tenggara 1972 sebagai agensi pembangunan serantau untuk rantau tenggara negeri Johor. Kejora Properties Sdn Bhd ('KPSB'), satu subsidiari bagi Kejora Holdings Sdn Bhd (subsidiari defendan pertama) memasuki satu perjanjian usahasama dengan Remedy Properties Sdn Bhd dan Ungku Jamilah Holdings Sdn Bhd dan persetujuan dicapai bahawa selepas pengasingan sebidang tanah ('tanah projek') kepada KPSB oleh Pihak Berkuasa Negeri, hak pembangunan atas tanah projek itu akan diberi kepada Fajar Kenari Sdn Bhd ('plaintif'), sebuah syarikat yang diperbadankan menurut perjanjian usahasama ('perjanjian JV'). Pada 25 Mac 1994, KPSB menulis surat kepada defendan pertama (dalam kapasitinya sebagai Pentadbir Tanah kawasan) memaklumkannya bahawa badan pengarah KEJORA bersetuju KPSB akan membangunkan tanah projek dan meminta defendan pertama sebagai Pentadbir Tanah kawasan tersebut memproseskan permohonan pengasingan projek tanah. Pada 1 Oktober 1994, mengikuti keputusan Kerajaan Persekutuan untuk menswastakan defendan pertama, satu perjanjian jual beli dimasuki oleh defendan pertama dan Southern Integrated Agriculture Project Sdn Bhd ('SIAP') untuk mengawardkan penswastaan aktiviti komersial defendan pertama kepada SIAP termasuk kepentingan dan liabiliti dalam KPSB dan plaintif. Pada 31 Mei 1995, defendan pertama mengemukakan kertas kerja kepada defendan kedua berhubungan dengan permohonan kelulusan bagi pengasingan tanah projek kepada plaintif untuk diluluskan oleh Pihak Berkuasa Negeri ('MMK'). Permohonan tersebut diluluskan oleh Pihak Berkuasa Negeri pada 9 Jun 1999. Pada 3 Ogos 1999, defendan kedua memaklumkan kepada defendan pertama bahawa MMK telah meluluskan pengasingan tanah projek kepada plaintif dan agar empat salinan pelan susun atur yang lengkap dikemukakan sebelum kelulusan muktamad diberi. Kemudian, defendan pertama melalui surat bertarikh 23 Februari 2006, memaklumkan pada defendan kedua bahawa badan pengarahnya bersetuju membatalkan permohonan pengasingan tanah projek kepada plaintif kerana telah melucutkan sahamnya dalam syarikat JV iaitu plaintif. Pada 16 Mei 2006, defendan pertama menghantar kertas kerja melalui defendan kedua untuk kelulusan MMK, bahawa tanah projek diasingkan kepada defendan

pertama untuk dibangunkan bersama dengan Iktikad Unggul Sdn Bhd. Permohonan tersebut ditolak oleh MMK. Oleh itu, pada 12 Februari 2010, defendan pertama menulis surat kepada defendan kedua meminta award tanah projek dikembalikan kepada plaintif. Seterusnya, satu mesyuarat dikendalikan antara defendan pertama, plaintif dan defendan kedua untuk membincangkan status pengasingan tanah projek kepada plaintif, dan dipersetujui bahawa defendan pertama akan membuat satu penghantaran semula kertas kerja kepada defendan kedua untuk kelulusan MMK. Walau bagaimanapun, MMK menolak permohonan rayuan itu. Oleh itu, plaintif memfailkan guaman terhadap defendan pertama dan kedua. Teras utama kes plaintif adalah MMK telah menolak permohonan untuk pengasingan semula tanah projek tersebut akibat tindakan-tindakan defendan pertama dan bahawa defendan pertama telah melanggar kewajipannya kepada plaintif untuk memastikan pengasingan tanah projek hanya diberi kepada plaintif. Hakim Mahkamah Tinggi memutuskan penghakiman memihak kepada plaintif dan memerintahkan, antara lain, satu pengisytiharan bahawa defendan pertama dengan khususnya melaksanakan tanggungjawabnya untuk melakukan segala apa yang diperlukan dan untuk mengemukakan semua rayuan relevan bagi memperoleh kelulusan untuk pengasingan tanah projek kepada plaintif. Oleh itu, defendan pertama merayu terhadap keputusan tersebut. Isu-isu yang timbul adalah, antara lain (i) sama ada wujudnya kontrak antara plaintif dan defendan pertama berhubungan obligasi defendan pertama untuk memastikan tanah projek diluluskan dan diasingkan kepada plaintif oleh MMK; (ii) sama ada defendan pertama melanggar kontrak yang didakwa apabila dapatan tidak menyokong apa-apa keterangan sama ada secara lisan atau dokumentar; (iii) sama ada defendan pertama adalah agen undang-undang plaintif yang dilantik untuk memohon pengasingan tanah projek untuk dan bagi pihak plaintif; dan (iv) sama ada tindakan atau kelakuan defendan pertama telah menyebabkan MMK menolak permohonan plaintif untuk pengasingan semula tanah projek.

Diputuskan (membenarkan rayuan)

Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Sebagai Pentadbir Tanah kawasan tersebut, defendan pertama adalah satu-satunya badan yang diberi kuasa memohon pengasingan tanah di rantau tenggara Johor dan permohonan-permohonan perlu dipohon melalui pejabat defendan kedua. Hakim bicara telah mendapati bahawa surat bertarikh 21 April 2010 daripada defendan kedua dan surat bertarikh 14 Jun 2010 daripada defendan pertama berjumlah pengesahan dan pengusahaan dan persetujuan tersirat antara plaintif dan defendan pertama bahawa defendan pertama berkewajipan memperoleh kelulusan MMK untuk pengasingan tanah projek kepada plaintif. Hakim bicara terkhilaf dari segi undang-undang dan/atau fakta dalam membuat keputusan tersebut kerana beliau tersalah faham kandungan dokumen-

dokumen itu. Adalah jelas daripada kandungan surat tersebut bahawa defendan pertama hanya menyampaikan kepada plaintif keputusan MMK pada 9 Jun 1999 meluluskan pengasingan tanah projek kepada plaintif atas terma dan syarat yang dinyatakan dalam surat defendan kedua bertarikh 21 April 2010. Defendan pertama hanya menunaikan kewajipannya sebagai Pentadbir Tanah untuk kawasan di mana tanah projek terletak apabila mengeluarkan surat bertarikh 14 Jun 2010. Kedua-dua surat tersebut dikeluarkan dalam pelaksanaan tugas defendan pertama dan kedua sebagai Pentadbir Tanah dan Pengarah Tanah Galian masing-masing. Mereka tidak boleh, tanpa keterangan menyokong menetapkan terma dan syarat perjanjian yang didakwa, ditafsirkan sebagai bukti perjanjian antara defendan pertama dan plaintif.

(2) Keterangan DW1 tidak menyokong dapatan Mahkamah Tinggi bahawa terdapat perhubungan prinsipal-agen antara plaintif dan defendan. Keterangan menunjukkan bahawa defendan pertama hanya menjalankan tugasnya sebagai Pentadbir Tanah apabila mengemukakan permohonan untuk pengasingan tanah projek kepada plaintif, kepada MMK. Hakim bicara terkhilaf dari segi undang-undang dan/atau fakta apabila beliau memutuskan berdasarkan keterangan defendan pertama DW1 adalah agen undang-undang yang dilantik untuk memohon pengasingan projek tanah untuk dan bagi pihak plaintif.

(3) Dapatan hakim bicara bahawa keputusan MMK menolak permohonan plaintif untuk pengasingan semula tanah projek adalah disebabkan kelakuan defendan pertama, adalah dengan jelasnya tidak boleh dikekalkan. Tiada keterangan dikemukakan di hadapan hakim bicara bagi menunjukkan asas keputusan MMK. Tanpa keterangan sebegitu, dapatan hakim bicara membabitkan defendan pertama dalam keputusan MMK adalah 'tidak lebih dari sekadar anggapan fakta yang tidak dibuktikan oleh keterangan.'

(4) Kuasa untuk mengasingkan tanah projek kepada plaintif terletak secara eksklusif dengan Pihak Berkuasa Negeri. Seksyen 78(3) Kanun Tanah Negara dengan jelasnya menetapkan bahawa sehingga nama pemilik didaftarkan pada dokumen daftar hak milik, Pihak Berkuasa Negeri (MMK) mempunyai kuasa menangani tanah negeri termasuk pengasingan tanah kepada pihak-pihak lain dan membatalkan apa-apa kelulusan pengasingan yang dibuat sebelum ini, dan di mana perlu, mengembalikan pembayaran yang telah dibuat apabila notis Borang 5A dikeluarkan. Tambahan lagi, tiada keterangan telah dikemukakan bagi menunjukkan bahawa defendan pertama dalam peranannya sebagai Pentadbir Tanah untuk rantau tenggara Johor dan dalam kapasitinya sebagai pihak

berkuasa tanah serantau untuk Johor Tenggara adalah dalam kedudukan untuk mendesak Pihak Berkuasa Negeri atau MMK supaya tanah projek diasingkan secara eksklusif kepada plaintif. Adalah mustahil dari segi undang-undang dan fakta untuk defendan pertama memenuhi obligasi sebegitu.

Case(s) referred to:
Azman Mahmood & Anor v. SJ Securities Sdn Bhd [2012] 6 CLJ 573 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC ***(refd)***

Legislation referred to:
National Land Code, ss. 12, 78(3)

For the appellant - Abu Daud Abd Rahim & Farah Nadiah Zainudin; M/s Azmi & Assocs
For the 1st respondent - Loh Siew Cheang, Yap Mong Jay & Verene Tan; M/s Cheang & Ariff
For the 2nd respondent - Anis Wahidah Mohamad; State Legal Advisor, Johor

[Editor's note: Appeal from High Court, Johor Bahru; Civil No: 21NCVC-11-11-2013 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Alizatul Khair Osman JCA:

Introduction

[1] This appeal by the appellant, Lembaga Kemajuan Johor Tenggara (KEJORA) (the first defendant in the High Court) arises out of the decision of the learned High Court Judge in Johor Baru who had, after a full trial allowed the first respondent's (the plaintiff in the court below) claim against the appellant and dismissed the first respondent's claim against the second respondent (the second defendant in the court below). There is no cross-appeal by the first respondent against the dismissal of its claim.

[2] We heard the appeal wherein at the conclusion of the hearing, we unanimously allowed it with costs of RM40,000 to the appellant. We set out below the reasons for our decision. The parties will be referred to as they were referred to in the High Court including the second defendant, although he is not a party to this appeal.

Background

[3] The first defendant (KEJORA) is a statutory body established under Lembaga Kemajuan Johor Tenggara Act 1972 (Act 75) as a regional development agency for the southeast region of Johor.

[4] The first defendant is also authorised by the State Authority of Johor to act as the Land Administrator for Kota Tinggi/Kluang by virtue of Warta Kerajaan Negeri Johor Bil. 10 Jld. 16 Tahun 1972 and s. 12 of the National Land Code.

[5] To fully appreciate the factual background leading to this dispute, it is perhaps necessary to set out the facts as set out in the parties' "common chronology of facts" which we adopt for the purpose of this judgment, *albeit*, with some modifications:

> On 1 October 1993, Kejora Properties Sdn Bhd (KPSB), a subsidiary of Kejora Holdings Sdn Bhd (a subsidiary of the first defendant) entered into a joint venture agreement with Remedy Properties Sdn Bhd and Ungku Jamilah Holdings Sdn Bhd whereby it was agreed that upon alienation of the project land to KPSB by the State Authority, the development rights over the project land would be granted to Fajar Kenari Sdn Bhd (the plaintiff), a company incorporated pursuant to the joint venture agreement. (JV agreement).
>
> On 25 March 1994, KPSB wrote a letter to the first defendant (in its capacity as Land Administrator of the area) informing the latter that KEJORA's Board of Directors' Meeting Bil. 2/92 had agreed that KPSB would develop the project land and requesting the first defendant as the Land Administrator for the said area to process the application for alienation of the project land.
>
> On 18 January 1995, the first defendant wrote a letter to the Land Administrator (Pentadbir Tanah Daerah) of the District of Kota Tinggi requesting the PTD No. for the project land and suggestions and recommendation on the housing project.
>
> Prior to that, on 1 October 1994 following the decision of the Federal Government to privatise the first defendant, a sale and purchase agreement was entered into between the first defendant and Southern Integrated Agriculture Project Sdn Bhd (SIAP) to award the privatisation of the first defendant's commercial activities to SIAP including its interest and liabilities in KPSB and the plaintiff.
>
> On 31 May 1995, the first defendant submitted a working paper to the second defendant in relation to the approval application for the alienation of the project land to the plaintiff for the approval of the MMK.
>
> The said application was approved by the State Authority on 9 June 1999.

A On 3 August 1999, the second defendant wrote to the first defendant informing the latter that the MMK had approved the alienation of the project land to the plaintiff and to submit four copies of completed layout plans before final approval can be given.

B A similar letter was written by the second defendant to the Land Administrator of the District of Kota Tinggi on 12 March 2003 informing the latter of the State Authority's decision and the requirement to submit four copies of completed layout plans before the issuance of final approval. This letter was copied to the first defendant and the plaintiff.

C Subsequently, the first defendant *vide* its letter dated 23 February 2006, informed the second defendant that its board of directors had agreed to cancel and revoke the application for the alienation of the project land to the plaintiff. In its place, the first defendant had decided that the development of the project land be given to Iktikad Unggul Sdn Bhd.

D In the said letter, the first defendant explained that the cancellation and revocation of the approval of the alienation was because it had divested its shares in the JV company ie, the plaintiff, following the Federal Government's decision to privatise its commercial activities (including its interest in the plaintiff).

E Thus on 16 May 2006, the first defendant forwarded a working paper (the said application) through the second defendant for the MMK's approval, that the project land be alienated to the first defendant to be jointly developed with Iktikad Unggul Sdn Bhd.

F The said application was rejected by the MMK as conveyed to the first defendant by the second defendant *vide* the latter's letter dated 11 January 2005.

G The first defendant through the second defendant appealed to the MMK on 25 January 2007 to reconsider its decision but was informed by the second defendant on 5 June 2007 that its appeal had been rejected by the MMK on 23 May 2007.

H On 12 February 2010 the first defendant wrote a letter to the second defendant requesting that the award of the project land be returned to the plaintiff in accordance with the layout plans submitted to the second defendant on 15 June 2009.

I Although the MMK had on 9 June 1999 approved the project land to be alienated to the plaintiff, a formal letter informing the terms and conditions of the said approval was only issued by the second defendant to the first defendant on 21 April 2010.

On 14 June 2010, the first defendant wrote to the plaintiff informing them of the MMK's decision on 9 June 1999 and the terms and condition of the said approval. The first defendant requested the plaintiff to appoint a licensed land surveyor for the submission of the Form 5A.

Meanwhile on 5 October 2011, Iktikad Unggul Sdn Bhd appealed to the Chief Minister of Johor to reconsider the MMK's decision on 23 May 2007 which rejected its appeal that the project land alienated to the first defendant be jointly developed with Iktikad Unggul Sdn Bhd.

On 7 June 2012, Total Survey Consultants, the licensed land surveyor appointed by the plaintiff, *vide* its letter of even date informed the first defendant that there was a reduction of 55 units from the pre-computation plan and that the second defendant had suggested that the first defendant submit a new working paper in accordance with the pre-computation plan prepared by the surveyor.

On 21 June 2012, the first defendant forwarded a working paper titled *inter alia*, "Rayuan permohonan semula sempadan tanah secara serah balik kurnia semula (SBKS) bagi tujuan pembangunan perumahan bercampur kepada Syarikat Fajar Kenari Sdn Bhd." to the second defendant.

On 7 September 2012, a meeting was held between the first defendant, the plaintiff and the second defendant to discuss the status of alienation of the project land to the plaintiff, and it was agreed that the first defendant would make a resubmission of the working paper to the second defendant for the MMK's approval.

On 13 September 2012, the first defendant presented to the second defendant a working paper titled "Permohonan Semula Pecah Sempadan Tanah Secara Serah Balik Kurnia Semula (SBKS) di atas tanah seluas 289.53 ekar Fasa III, di Bandar Penawar, Mukim Tanjung Surat, Daerah Kota Tinggi, Johor bagi tujuan pembangunan perumahan bercampur" to be approved by the MMK.

[6] *Vide* letter dated 9 January 2013, the second defendant informed the first defendant that the MMK during its sitting on 19 December 2012 had decided to 'menolak rayuan permohonan akuan semula dan permohonan tanah PTB 2322 hingga PTB 4890 seluas 289.53 ekar Mukim Tanjung Surat, Daerah Kota Tinggi sebagaimana berlakar 'merah' pada pelan bagi Projek Perumahan Fasa 3, Bandar Penawar daripada Lembaga Kemajuan Johor Tenggara (KEJORA), Fajar Kenari Sdn. Bhd. dan Syarikat Iktikad Unggul Sdn. Bhd.'.

[7] On 31 January 2013, the first defendant wrote to the plaintiff informing the plaintiff of the decision of the MMK rejecting its appeal application.

[8] On 31 October 2013, the plaintiff filed a suit (the subject matter of this appeal) against the first and second defendants seeking, *inter alia*, the following reliefs:

> (a) Deklarasi bahawa Defendan-Defendan dengan specifiknya melaksanakan obligasi-obligasi mereka untuk melakukan kesemua yang perlu dan membuat segala rayuan yang relevan dalam memperoleh kelulusan bagi memperoleh Tanah projek kepada Plaintif.
>
> (b) Ganti rugi am bagi pelanggaran terma-terma nyata dan/atau tersirat perjanjian di antara Defendan Pertama dan Plaintif.
>
> (c) Ganti rugi khas berpunca dari pelanggaran terma-terma nyata dan/atau tersirat surat kelulusan bertarikh 21.4.2010 dan perjanjian di antara Plaintif dan Defendan Pertama.

The Plaintiff's Case

[9] As submitted by the plaintiff, the main thrust of their case against the first defendant is that the MMK's rejection of their application for the re-alienation of the project land was caused by the first defendant's actions and that the first defendant had breached its duty and obligation to the plaintiff to ensure that the alienation of the project land should only be granted to the plaintiff.

[10] This is reflected in para. 15 of the plaintiff's amended statement of claim which reads as follows:

> 15. Plaintif menegaskan bahawa Defendan Pertama dan Defendan Kedua telah bersetuju dan mengesahkan bahawa Tanah Projek tersebut akan dikurniakan pada Plaintif. Akan tetapi, berdasarkan pada surat bertarikh 9.1.2013 dari Defendan Kedua kepada Defendan Pertama ia mengesahkan bahawa Defendan Pertama telah melanggari obligasi nyata telah membuat dua permohonan yang lain pengurniaan Tanah Projek tersebut bukan hanya berpihak pada Plaintif tetapi juga bagi Defendan Pertama sendiri dan Syarikat Pihak Ketiga dikenali sebagai Syarikat Iktikad Unggul Sdn. Bhd. Plaintif menegaskan bahawa *tindakan Defendan Pertama dan bertindak dalam memohon Tanah Projek tersebut dikurniakan kepada Defendan Pertama i.e. KEJORA dan Syarikat Pihak Ketiga ie, Syarikat Iktihad Unggul Sdn. Bhd. telah dengan serious membahayakan (jeopardized) dan memperjudikan kelulusan untuk mengurniakan Tanah Projek tersebut kepada Plaintif oleh Defendan Kedua dan Majlis Mesyuarat Negeri. Plaintif menegaskan bagi alasan dari itu, Defendan Pertama telah gagal untuk memenuhi obligasinya, terma-terma dan syarat-syarat di bawah perjanjian dengan Plaintif dan dengan niat jahat melanggari perjanjian di antara Defendan Pertama dan Plaintif.* (emphasis added)

[11] According to the plaintiff, its claim as framed above gave rise to the following issues:

(a) whether the actions of the first defendant had caused the MMK to subsequently reject the plaintiff's application for re-alienation of the project land; and

(b) if so, whether the first defendant had breached its duty and obligation to the plaintiff when its actions prejudiced the original approval given to the plaintiff by the MMK on 9 June 1999.

[12] These issues, according to learned counsel for the plaintiff "were very much factual disputes" and an appellate court would normally be very slow in interfering with the findings of facts of the trial judge unless the trial judge had misconstrued crucial evidence resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded (see *Azman Mahmood & Anor v. SJ Securities Sdn Bhd* [2012] 6 CLJ 573 at p. 685; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC – a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal).

[13] In this regard, learned counsel submitted that the learned trial judge had made findings of facts based on contemporaneous evidence, in determining the two issues outlined above and there is therefore no basis for this court to interfere with the learned judge's findings.

Inter alia, the learned judge found as follows:

(a) The first defendant is the legal agent appointed to apply for alienation of the project land for and on behalf of the plaintiff.

(b) It is the first defendant's duty and obligation to ensure that the alienation of the project land as approved by the MMK on 9 June 1999 should only be granted to the plaintiff and to no other third party, least of all to the first defendant itself.

(c) The first defendant breached this duly and obligation when it made two other application for alienation of the project land not only in favour of the plaintiff but also for itself.

(d) Although there is no formal contract between the plaintiff and the first and second defendants, the letter dated 21 April 2010 from the second defendant and the letter dated 14 June 2010 from the first defendant amounts to confirmation and tacit agreement between the plaintiff and the first defendant that the first defendant would be duty bound to obtain the State MMK approval for alienation of the project land to the plaintiff.

(e) The first defendant cannot be heard to say that as the Land Administrator it cannot be blamed for the MMK decision reversing its 9 June 1999 decision. Clearly, it was due to its action that the decision was reversed.

(f) Given its role and obligations *vis-à-vis* the plaintiff in the application process it is unacceptable for the first defendant to argue that it is the absolute powers of the MMK whether to revoke an approval given in respect of alienation of land to any party; and

(g) The plaintiff has established a concluded and existing contract between the plaintiff and the first defendant.

[14] Based on the aforesaid findings, the learned judge gave judgment in favour of the plaintiff and ordered that:

> (a) Defendan Pertama dengan spesifikasinya melaksanakan obligasi-obligasi Defendan Pertama untuk melakukan kesemua yang perlu dan membuat segala rayuan yang relevan dalam memperoleh kelulusan bagi memperoleh Tanah Projek kepada Plaintif;

(a declaration that the first defendant specifically perform its obligations to do all that would be necessary and to submit all relevant appeals to obtain the approval for alienation of the project land to the plaintiff)

It was further ordered by the learned judge as follows:

> … bahawa Defendan Pertama membayar Gantirugi Am dan Gantirugi Khas berserta faedah di atas kerugian yang akan ditaksirkan berserta kos.

(the first defendant to pay general and special damages with interest for the loss which would be assessed and costs)

The First Defendant's Case

[15] The first defendant denied that there was any agreement between the plaintiff and the first defendant as regards the alienation of the project land to the plaintiff.

[16] The first defendant alleged that in response to the first defendant's denial of the existence of such agreement, the plaintiff pleaded that such agreement was actually the alleged agreement between the plaintiff and KPSB and the obligations of KPSB under the alleged agreement were assumed by the first defendant upon the privatisation of KPSB in 1994. (See para. 4 of the first defendant's statement of defence, p. 24 of the core bundle, (Jld. 1))

[17] In fact, this was one of the issues to be tried, that is:

> IB Whether there was an agreement between the plaintiff and Kejora Properties Sdn. Bhd. and whether the 1st defendant had assumed all obligations of Kejora Properties Sdn. Bhd. upon the privatization of Kejora Properties Sdn. Bhd. in 1994.

(see p. 255 of the core bundle (Jld. 1))

[18] However, according to learned counsel for the first defendant, this issue was abandoned by the plaintiff during trial and instead evidence was led to show that the first defendant had breached the terms and conditions of the letter dated 14 June 2010 by applying for the re-alienation of the project land on behalf of other parties (which was also one of the issues to be tried at the trial (see p. 225, *supra*). A B

[19] The first defendant contended that the learned judge had erred in allowing the plaintiff to depart from its pleaded case when he made the following finding of fact that the letter dated 21 April 2010 from the second defendant and the letter dated 14 June 2010 from the first defendant amounted to "confirmation and undertaking and tacit agreement between the plaintiff and the first defendant that the first defendant would be duty bound to obtain State MMK's approval for alienation of the project land to the plaintiff." C

[20] In this regard, argued counsel for the first defendant, the learned judge erred in law and in fact in holding that there existed a contract between the plaintiff and the first defendant in respect of which the first defendant is obliged to ensure that the project land is approved and alienated to the plaintiff by the MMK and that the first defendant had breached the alleged contract when such finding was not supported by any evidence whether oral or documentary. D E

[21] Learned counsel for the first defendant further submitted that the learned judge's finding that the first defendant was the plaintiff's legal agent appointed to apply for the alienation project land for and on behalf of the plaintiff based purely on DW1's evidence was clearly erroneous in law and in fact. F

Our Findings

[22] As stated earlier, we had, after hearing counsel's submission and after perusing the appeal records, concurred with the first defendant's submissions and allowed the appeal with costs. The learned judge's decision was set aside and the plaintiff's claim was consequentially dismissed. G

[23] Learned counsel for the plaintiff in his submission contended that the main thrust of the plaintiff's case against the first defendant is that the MMK's rejection of the application for re-alienation of the project land (to the plaintiff) was caused by the first defendant's actions and that the first defendant had breached its duty and obligation to the plaintiff to ensure that the alienation of the project land should only be granted to the plaintiff. H

[24] In support of its case, the plaintiff set out the following facts which it contended led to the irresistible conclusion that it was the first defendant's deliberate conduct that had caused the MMK to reject the plaintiff's application for the re-alienation of the project land: I

A (a) though the first defendant was very much aware of the JV agreement and that the MMK had decided to alienate the project land only to the plaintiff, the first defendant, without informing the plaintiff, made an attempt to revoke and cancel the application for alienation of the project land to the plaintiff when it wrote to the second defendant on
B 23 February 2006. This request by itself would have seriously prejudiced the approval given to the plaintiff in 1999;

(b) the first defendant also made it clear to the second defendant of its intention to jointly develop the project land with Syarikat Iktikad Unggul Sdn Bhd when it appealed against the rejection of its application
C by MMK and requested for the project land to be alienated only to the first defendant instead;

(c) the first defendant only informed the plaintiff of the MMK's 1999 decision after its attempts to alienate the project land either to Syarikat Iktikad Unggul or to itself were unsuccessful;
D

(d) the first defendant, despite having full knowledge that the MMK had already rejected its application for the project land to be alienated to Syarikat Iktikad Unggul (to be jointly developed between them) and the first defendant's appeal that the land be alienated to the first defendant itself in 2006 and 2007 respectively, nevertheless took advantage of the
E working paper submitted to the second defendant on 13 September 2012 to slip in two out of three alternatives which would benefit the first defendant directly;

(e) the first defendant knew and agreed that it was supposed to only submit
F the working paper for the re-alienation of the project land to the plaintiff strictly pursuant to the MMK's decision given on 9 June 1999; and

(f) that instead of having only a single application made on behalf of the plaintiff in relation to the re-alienation of the project land, the MMK had, subsequent to its 9 June 1999 decision, received several
G applications for the alienation of the same project land to three different parties – the plaintiff, the first defendant and Syarikat Iktikad Unggul Sdn Bhd.

[25] In our view, whether such conduct or action on the part of the first defendant led to the rejection of the plaintiff's application for the re-
H alienation of the project land by the MMK and if so, whether such conduct amounted to a breach of the first defendant duties and obligation under the alleged contract between the plaintiff and the first defendant can only be answered by determining at the outset the fundamental question underlying this whole appeal, ie, – whether there was in fact and in law a concluded
I contract between the first defendant and the plaintiff containing the terms and conditions which the first defendant is alleged to have breached.

[26] As regards the existence of a contract between the plaintiff and the first defendant, the plaintiff had pleaded as follows in their amended statement of claim:

> 4. Plaintif menegaskan bahawa melalui surat bertarikh 25.3.1994, KEJORA Properties Sdn Bhd memaklumkan kepada Lembaga Pengarah Defendan Pertama bahawa KEJORA Properties Sdn Bhd telah diberi hak memajukan tanah di Fasa III Bandar Penawar, Mukim Tanjung Surat, Kota Tinggi (kemudian daripada ini dirujuk sebagai 'Tanah Projek') dan meminta KEJORA (Defendan Pertama) untuk memohon bagi permohonan untuk pengurniaan Tanah Projek tersebut daripada Defendan kedua melalui Mesyuarat Kerajaan Negeri.
>
> 5. Kemudiannya, satu perjanjian telah dimasuki di antara Plaintif dan Defendan Pertama untuk memberikan Plaintif hak yang tunggal dan eksklusif untuk memajukan Tanah Projek tersebut setelah mendapat kebenaran dari Defendan Kedua dan Majlis Mesyuarat Negeri dan pihak-pihak berkuasa yang relevan berkaitan dengan permohonan bagi pengurniaan Tanah Projek dari Defendan Pertama kepada Plaintif selaras dengan Mesyuarat yang telah diadakan di KEJORA HOLDINGS SDN BHD PADA 25.9.1994.
>
> 6. Terma-Terma dan Syarat-Syarat yang nyata dan tersirat dari perjanjian di antara Defendan Pertama dan Plaintiff adalah bahawa Defendan Pertama harus memohon dan mendapatkan pengurniaan Tanah Projek bagi pemajuan dan mengambil kesemua langkah-langkah untuk memperoleh dan mendapatkan pengurniaan Tanah projek tersebut menyokong Plaintif.
>
> 7. Defendan Pertama selaras dengan perjanjian di antara Plaintif dan Defendan Pertama telah mengisukan surat bertarikh 18.1.1995 kepada Defendan Kedua memohon Tanah Projek tersebut dikurniakan kepada Plaintif dan sesalinan surat bertarikh 18.1.1995 telah dimajukan kepada Plaintif menurut terma-terma dan syarat-syarat perjanjian di antara Plaintif dan Defendan Pertama.

[27] The learned judge found that:

> Although there is no formal contract between the plaintiff and the 1st and 2nd defendants the letter dated 21.4.2012 from the 2nd defendant and the letter dated 14.6.2010 from the 1st defendant amounts to confirmation and undertaking and tacit agreement between the plaintiff and the 1st defendant that the 1st defendant would be duty bound to obtain state MMK approval for alienation of the project land to the plaintiff.

[28] We were in agreement with learned counsel for the first defendant that the learned judge committed an error of law and/or in fact in making the above finding as His Lordship had misapprehended the contents of the documents.

[29] The letter dated 21 April 2012 was issued by the second defendant to the first defendant and was attached to the first defendant's letter of 14 June 2010 to the plaintiff.

[30] In essence, the second defendant's letter of 21 April 2012 was to inform the first defendant of the MMK's decision on 9 June 1999 regarding the plaintiff's application for the alienation of the project land. The letter states, *inter alia*, as follows:

> … Adalah dimaklumkan bahawa Majlis Mesyuarat Kerajaan Johor di mesyuaratnya pada 9.6.1999 telah menimbangkan Ringkasan Mesyuarat Bil. 1227/99 telah mengambil keputusan bagaimana berikut:
>
> Majlis BERSETUJU tanah-tanah sebagaimana dibutirkan di bawah, Mukim Tanjung Surat, Kota Tinggi sebagaimana berlakar "merah" pada pelan dikurniakan kepada FAJAR KENARI SDN. BHD. bagi tujuan tapak pembinaan Fasa III, Bandar Penawar dengan dikenakan bayaran dan syarat-syarat: …

[31] Pursuant to the aforesaid letter, the first defendant wrote to the plaintiff on 14 June 2010 informing the latter of the MMK's decision and enclosing the second defendant's letter of 21 April 2010. The letter of 14 June 2010 reads, as follows:

> Adalah dimaklumkan bahawa Majlis Mesyuarat Kerajaan Johor di mesyuaratnya pada 9.6.1999 sebagaimana Ringkasan Mesyuarat Bil. 1227/99 telah mengambil keputusan bersetuju tanah tersebut di atas dikurniakan kepada FAJAR KENARI SDN BHD bagi tujuan tapak pembinaan Fasa III, Bandar Penawar. Bersama-sama ini disertakan salinan surat kelulusan daripada Pengarah Tanah dan Galian Johor Bil. (19) dlm. PTG.V1/4/95 bertarikh 21 April 2010.
>
> Pihak tuan dengan ini adalah dipohon untuk melantik Jurukur Tanah Berlesen bagi menyediakan perkiraan Borang 5A Kanun Tanah Negara sebagaimana format yang disertakan.

[32] It was clear from the contents of the aforesaid letter, that the first defendant was merely conveying to the plaintiff the decision of the MMK on 9 June 1999 approving the alienation of the project land to the plaintiff upon the terms and conditions spelt out in the second defendant's letter of 21 April 2010.

[33] The first defendant was merely discharging its duty as the Land Administrator for the area in which the project land is situated when it issued the letter of 14 June 2010.

[34] As duly acknowledged by the learned judge, being the Land Administrator for that area, the first defendant was the only body authorised to apply for the alienation of land in the south-east region of Johor with such applications required to be made through the office of the second defendant.

[35] These two letters were issued in the exercise of the first and second defendants' duties as Land Administrator and Pengarah Tanah dan Galian respectively. They could not, in the absence of any corroborative evidence setting out the terms and conditions of the alleged agreement, be construed as evidence of an agreement between the first defendant and the plaintiff under which the first defendant is "duty bound to obtain State MMK approval for alienation of the project land to the plaintiff, as found by the learned judge."

[36] In other words, in the absence of any other evidence, oral or documentary, it could not be presumed that the first defendant was acting in pursuance of its contractual obligations when it notified the plaintiff of the MMK's decision on 9 June 1999 *vide* its letter dated 14 June 1999.

[37] The learned judge was, with great respect, plainly wrong when he concluded that the letter dated 21 April 2012 from the second defendant and the letter dated 14 June 2010 from the first defendant amounted to "confirmation and undertaking and tacit agreement between the plaintiff and the first defendant that the first defendant would be duty bound to obtain State MMK approval for alienation of the project land to the plaintiff."

[38] Further, para. 4 of the plaintiff's reply to the first defendant's defence denying the existence of such a contract raises further doubt as to the existence of such an agreement. We reproduce below para. 4 of the plaintiff's reply:

> 4. Dalam menjawab perenggan 4 Penyataan Pembelaan tersebut, *Plaintif menyatakan bahawa Perjanjian yang dikatakan tersebut adalah berikutan dengan Perjanjian di antara Plaintif dan Kejora Properties Sdn Bhd pada asalnya.* Setelah Kejora Properties diswastakan pada tahun 1994, segala urusan yang dikendalikan oleh Kejora Properties telah diagihkan dan diambil alih oleh Defendan Pertama. Maka Defendan Pertama menjadi pihak yang bertanggungjawab untuk memajukan permohonan pengurniaan tanah projek bagi Plaintif tersebut dan juga mengambil alih tanggungjawab untuk menyempurnakan perjanjian di antara Kejora Properties dan Plaintif tersebut. Berikutan dengan itu, Defendan Pertama telah memajukan surat bertarikh 31.5.1995 kepada Defendan Kedua memohon pengurniaan tanah projek diberikan kepada Plaintif. (emphasis added)

[39] In this connection, we also agreed with learned counsel for the first defendant that the learned judge erred in law and/or in fact when His Lordship held that based on the evidence of the first defendant DW1 was the legal agent appointed to apply for alienation of the project land for and on behalf of the plaintiff.

[40] The particular excerpt of DW1's evidence in cross-examination relied on by the learned judge to support his finding is reproduced below:

A
Parthiban: Encik Salim, Question 14. Jelaskan secara am, berkenaan dengan kertas kerja tersebut. Ini adalah urusan untuk apa?

Salim: Ini untuk tujuan, diangkat kepada kerajaan untuk kelulusan MMK.

Parthiban: Kepada siapa? Kelulusan untuk siapa?

B
Salim: Kepada pemohon.

Parthiban: Pemohon itu siapa?

Salim: Pemohon adalah Kejora.

C
Parthiban: Di 16. Rujuk jawapan tuan, tadi yang mana beritahu, Kejora, meminta Kejora untuk mengendalikan proses permohonan. Dan kenapa permohonan kemudiannya dibuat untuk Fajar Kenari? Kenapa?

Salim: Permohonan bagi tanah-tanah Kejora untuk, pembangunan perumahan akan diluluskan kepada Kejora ataupun kepada

D
syarikat usaha bersama yang telah dipersetujukan oleh lembaga pengarah.

Parthiban: Dan ini adalah, so Fajar Kenari di sini, kira plaintif yang memohon untuk diberikan?

E
Salim: Ya saya.

Parthiban: So segala urusan kamu adalah untuk mendapatkan kelulusan, kelulusan pada Fajar Kenari?

Salim: Fajar Kenari, ya saya.

Parthiban: Itu adalah tugas kamu?

F
Salim: Saya.

Parthiban: Dengan company ini. Soalan 19. Adakah tanggungjawab Kejora terhadap, apakah tanggungjawab Kejora terhadap Fajar Kenari? So kamu ada katakan, tanggungjawab Kejora hanya adalah untuk mengendalikan proses permohonan

G
kelulusan berkaitan dengan pihak berkuasa dan Jabatan berkaitan, Kejora tidak mempunyai apa-apa kepentingan dalam. Tanggungjawab, sama ada pemaju ingin membuat bangunan-bangunan. So inilah tugas kamu, kamu confirmkan lagi sekali, tugas kamu adalah untuk mendapatkan

H
permohonan kurniaan itu, pada Fajar Kenari. Betul?

Salim: Betul.

[41] However, a perusal of DW1's evidence further on during cross-examination would reveal that the evidence of DW1 relied on by the learned judge (above) was taken out of context. This was DW1's further testimony

I
in cross-examination on this issue:

Parthiban: Dalam soalan 20 you katakan, adakah perjanjian dimasuki antara Fajar Kenari dengan Kejora? Kamu kata tidak. Kejora tidak pernah memasuki dengan Fajar Kenari. Tak apa. Ok. Kalau kata, kamu kata tidak. Kenapakah kamu uruskan segala-gala perlantikan, kamu, untuk buatkan semua kerja permohonan semua, untuk Fajar Kenari, kenapa?

Salim: *Sebagai, pentadbir tanah Kejora. Tanggungjawab Kejora ialah memproses, permohonan-permohonan tanah yang telah kita terima dan diluluskan oleh pengarah, untuk kita angkat kepada pengarah tanah dan galian, dan seterusnya akan diluluskan oleh kerajaan negeri melalui MMK dan kita akan mengeluarkan Borang 5A dan seterusnya mendaftar hak milik tanah.*

Parthiban: So, walau apa, sekali kata pun, kamu, kamu bersetuju untuk buatkan permohonan untuk Fajar Kenari?

Salim: *Memang tugas saya untuk menyelesaikan permohonan-permohonan tanah yang kita terima di Kejora.* (emphasis added)

[42] Viewed as a whole, DW1's evidence did not lend support to the High Court's finding of a principal-agent relationship between the plaintiff and the defendant. Rather the evidence showed that the first defendant was merely carrying out its duty as a Land Administrator when it submitted the application for alienation of project land to the plaintiff, to the MMK.

[43] Other than the evidence of DW1, which as seen above was taken out of its proper context the plaintiff did not produce any evidence to show the manner and when the first defendant was appointed by the plaintiff as the legal agent for the purpose of alienation of the project land to the plaintiff.

[44] Thirdly, on the issue of whether the first defendant's actions or conduct (see para (25) *(supra)*) had caused the MMK to reject the plaintiff's application for the re-alienation of the project land, the learned judge was of the view that the MMK's decision was clearly attributable to the first defendant's action in submitting three alternatives in its working paper to the MMK pursuant to the latter's decision of 9 June 1999, *viz*:

(1) The land to be alienated to the 1st defendant;

(2) The land to be alienated to the 1st defendant and the 1st defendant be allowed to develop the project jointly with the plaintiff as a joint-venture project;

(3) The land to be alienated to the plaintiff as per the MMK decision on 9.6.1999.

(see p. 6 of the core bundle (penghakiman) and pp. 513-514, core bundle (Jld. (2)).

The learned judge then went on to hold that in doing so, the first defendant had breached the alleged contract between the plaintiff and the first defendant.

[45] The learned judge's finding that the MMK's decision to reject the plaintiff's application for re-alienation of the project land was due to the action of the first defendant as set out above is in our view clearly unsustainable. No evidence was adduced before the learned judge to show the basis for the MMK's decision on 19 December 2012.

[46] The "Ringkasan Mesyuarat Bil. 2526/2012" deliberated by the MMK at its meeting on 19 December 2012 was also not adduced as evidence. In the absence of such evidence and without any evidence to show the basis of the decision of the MMK on 19 December 2012, we concurred with the first defendant that the finding of the learned judge implicating the first defendant for the MMK's decision was "nothing more than an assumption of fact unsubstantiated by evidence."

[47] In any event, in the light of our finding that the learned judge was wrong in holding that there existed a concluded contract between the plaintiff and the first defendant, the learned judge's finding that the decision of the MMK to reject the plaintiff's application for re-alienation was due to the first defendant's action and that this action amounted to a breach of the latter's contractual obligation, is no longer relevant.

[48] For completeness, we would add that quite apart from there being no evidence adduced to support the learned judge's finding that it is the first defendant's duty and obligation to ensure that the alienation of the project land as approved by the MMK on 7 June 1999, should only be granted to the plaintiff, the learned judge failed to take into consideration that it was legally and factually impossible for the first defendant to fulfil such obligation.

[49] Firstly, the power to alienate the project land to the plaintiff lies exclusively with the State Authority. It is clearly stipulated in s. 78(3) of the National Land Code, that until the name of the proprietor is registered on the register document of title, the State Authority (the MMK) has all the power to deal with state land including alienating the land to other parties and revoking any approval for alienation previously made, and where necessary refunding the payments already made upon issuance of notice in Form 5A. (see *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729).

[50] Secondly, contrary to the learned judge's finding in para. 10 of his judgment, no evidence was adduced to show that the first defendant in its role as Land Administrator for the south-east region of Johor and in its capacity

as the Regional Land Authority for Johor Tenggara was in a position to impose on the State Authority or MMK that the project land be alienated exclusively to the plaintiff.

Conclusion

[51] For the reasons set out above, we were constrained to allow the appeal and set aside the learned judge's decision. We also awarded costs to the appellant and ordered that the deposit be refunded.